UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, as collector of Internal Revenue of the United States for the First Collection District.
Plaintiff in Error.

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of George D. Bliss, deceased,
Defendant in Error.

No. 2034.

BRIEF OF DEFENDANT IN ERROR ON REHEARING

MARSHALL B. WOODWORTH,
Attorney for Defendant in Error.

EDWARD LANDE,
Of Counsel.

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A re-hearing was granted by this Honorable Court on November 1, 1912.

Counsel for plaintiff in error contended, on page 2 of his Petition for Re-hearing:

I.

"That there is an interest passing to the said Harriet L. Herrmann which can be definitely ascertained.

II.

The value being ascertainable, the Court should make a final disposition of the case upon the record in favor of plaintiff in error."

We respectfully maintain that neither contention is tenable.

This Honorable Court, in its opinion rendered April 1, 1912, in the above entitled case and four companion cases (consolidated for the purposes of trial and appeal) said: "In the fourth suit, Muenter v. Bliss, personal property was left to certain trustees to be held in trust for the benefit of one Harriet L. Herrmann so long as she should remain the wife of the man who was then her husband, the income in the meantime to be paid to her. At the time of the levy of the tax in question, and at the time of the trial in the court below, she was still the wife of Herrmann." * * *

In holding that the legacies left in trust, in the above entitled case, were contingent, beneficial interests which had not vested previous to the repeal of the War Revenue Act, which repeal took effect July 1, 1902, this Honorable Court said:

"The question presented in the court below was whether the personal property and legacies left under the terms of the respective wills to the trustees, in trust for the respective beneficiaries, were contingent beneficial interests, or whether the property in each case vested absolutely in possession or enjoyment, and thereby became subject to the tax within the meaning of Act Cong. June 13, 1898, 30 Stat. 448, as

amended by Act March 2, 1901, 31 Stat. 946, and supplemented by Act June 27, 1902, 32 Stat. 406, and as affected by Act April 12, 1902, c. 500, 32 Stat. 96 (U. S. Comp St. Supp. 1911, p. 978), repealing the former acts, the repeal to take effect on July 1, 1902.

In each case the legacies had been assessed for the gross amount thereof and the taxes had been paid under protest, and in each case the action had been brought by the respective defendants in error to recover the amount so paid on the ground that the tax had been unlawfully imposed and collected. The court below held that the legacies were contingent beneficiary interests and not vested, and rendered judgments for the defendants in error on the authority of Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, and the decision of this court in Lynch v. Union Trust Co., 164 Fed. 161, 90 C. C. A. 147, and other cases. The legacies having been assessed in gross and upon the theory that the interests were vested, the decision in Vanderbilt v. Eidman was deemed applicable. But in the recent case of United States v. Fidelity Trust Co., 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed.——, decided December 4, 1911, it was held that a legacy of property in trust to a trustee who was to pay the net income to the legatee in periodical payments during the latter's life is not a contingent interest, but a vested estate for life, and that it was assessable under the War Revenue Act of June 13, 1898, upon its value as ascertained with the aid of mortuary tables. On principle we think there can be no distinction between the estate of the beneficiary of*such income of a legacy for life* and that of the beneficiary of such income for a *term of years,* and on the authority of the decision last cited we must hold that in the case of Muenter v. Union Trust Co., and the case of Muenter v. Rosen-

feld, the rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, *but upon the value of the rights to receive the annual income as determined in United States v. Fidelity Trust Co., supra.* * * *

In the case of Muenter v. Bliss, in which the income was to be paid to Harriet L. Herrmann as long as she remained the wife of her husband, the estate in the income is too uncertain to admit of measurement in value."

In the view of this Honorable Court, that "the income is too uncertain to admit of measurement in value," we respectfully acquiesce.

How long Mrs. Harriet L. Herrmann will remain the wife of George Herrmann is impossible to foretell or estimate. The contingency is most uncertain and depends not only on the life of Mrs. Herrmann but also upon the duration of life of Mr. Herrmann; or, again, the relationship might be terminated by divorce. In other words, the relationship of husband and wife can be terminated in any one of three ways; (1) by the death of the husband; (2) by the death of the wife; (3) by divorce. Which will it be in the case at bar? Who can foretell? Upon what basis shall the right to the income be predicated? Upon the life of the husband? Or, upon the life

of the wife? The difficulties in the way of a fair and just computation are not imaginary or fanciful, but real.

Aside from these uncertainties to admit of measurement in value, the vested right in the income to be derived from a legacy of $14,872.26, left in trust to Mrs. Herrman, ascertained with the aid of the mortuary tables promulgated by the Commissioner of Internal Revenue, is too small to be the subject of any legacy tax at all. In other words, the vested right to the income *during the life* of Mrs. Herrmann did not amount to the sum of $10,000.00 and, therefore, was not subject to a legacy tax under the War Revenue Act of June 13, 1898. This will be made clearer by the computation which will be illustrated later on.

In this case, the defendant in error sued to recover $1, 497.94, claimed to have been taxes unlawfully and erroneously collected by the Collector of Internal Revenue upon devises and bequests made by the deceased, George D. Bliss, in favor of his several children, including his daughter Harriet who had married and, at the time of his death, was the wife of George L. Herrmann. (See Complaint, Transcript of Record, p. 7).

At the trial, the defendant in error only recovered the two small sums of $2.14 and $111.54, aggregating $113.68, which, with accrued interest allowed by law, totalled $169.05, the amount of the judgment recovered in this case. (See Transcript of Record, pp. 26-28).

As to the sum of $2.14 there cannot be the slightest objection and the judgment must be affirmed as to that sum. The record shows that $2.14 represented the legacy tax unlawfully and erroneously imposed by the Collector of Internal Revenue upon ten shares of stock in the Farmers' Ditch Company, which the deceased devised to his wife during her lifetime, and upon her death said ten shares to be divided equally among three daughters, one of them being Mrs. Harriet L. Herrmann. (See evidence contained in the Transcript of Record in case in this court No. 2031 containing the consolidated bill of exceptions pp. 122, 123, 124, 125, 126, 132, 133; See also Legacy Return and Schedule made to the Collector of Internal Revenue, marked Plaintiff's Exhibit 1.)

It must be obvious that the ten shares could not become vested in the three daughters until the death of the mother, which did not take place prior to the repeal of the War Revenue Act on July 1, 1902, and

that said beneficial interests in said ten shares were therefore contingent and not vested interests at the time of the repeal of the law.

Furthermore, it must be equally obvious that the vested right to an income from the ten shares could never amount to the sum of $10,000.00 so as to be subject to a legacy tax. The Transcript of Record, at page 123 of the record in case No. 2031 (containing the consolidated bill of exceptions) shows that the amount was $142.86 to each of the daughters. (See also Legacy Return and Schedule made to the Collector of Internal Revenue, marked Plaintiff's Exhibit 1.)

We next take up the other item of legacy tax recovered by the defendant in error, to-wit, the sum of $111.54, the same being the tax assessed and collected by the Collector of Internal Revenue upon the legacy of $14,872.26 left in trust for Mrs. Harriet L. Herrmann so long as she should continue to remain the wife of George Herrmann.

It is to be observed, parenthetically and by way of explanation, that all the evidence, oral and documentary, in the case at bar will be found printed in the "Consolidated Bill of Exceptions," in the Transcript of Record in case No. 2031—a companion case to the case at bar, and that this was done to save the Govern-

ment expense in appealing five separate cases, of which the case at bar is one. Outside of the evidence, all of the pleadings and other proceedings peculiar to the case at bar will be found printed in the Transcript of Record in this case (No. 2034).

It is proper to observe that certain original exhibits introduced as evidence in the case at bar, and mentioned on page 133 of the Transcript of Record in Case No. 2031, were not printed in the "Consolidated Bill of Exceptions," in order to save expense to the Government, and that these original exhibits have been transmitted to the Clerk of this Court as part of the record in the case.

By his will, George D. Bliss devised and bequeathed to his son-in-law, Jeremiah F. Sullivan, certain personal property in trust, on the following terms, viz:

"1. To hold the same in trust for my daughter, Harriet L. Herrmann, so long as she continues to be the wife of said George Herrmann.

2. To manage, control and operate the same during the existence of this trust.

3. To pay over to my said daughter annually, the rents, issues, profits and income thereof, after deducting the expenses of managing, controlling and operating the same.

Said trust shall terminate whenever by said daughter ceases to be the wife of said George Herrmann.

If my said daughter shall cease to be the wife of said George Herrmann before her death, then, and in that event, the property embraced in said trust, shall vest in fee simple absolute to my daughter, Harriet L. Herrmann. In case my said daughter dies while she is the wife of said George Herrmann, then, and in that event, the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike."

The value of the legacy thus left in trust for the benefit of Harriet L. Herrmann was assessed by the Collector of Internal Revenue at the clear value of $14,872.26, and, as previously stated, a legacy tax of $111.54 thereon was assessed, imposed and collected.

The corpus of the legacy, to-wit: the sum of $14,-872.26, of course, never vested prior to the repeal of the War Revenue Act on July 1, 1902, and had not vested when suit was brought or before judgment was recovered. Mrs. Harriet L. Herrmann cannot acquire this legacy of $14,872.26 "so long as she continues to be the wife of George Herrmann." So far as the record discloses, she is still the wife of George Herrmann.

Counsel for the plaintiff in error does not find fault with that portion of the opinion of this court, filed April 1, 1912, holding that the legacy of $14,-872.26 had not vested previous to the repeal of the

War Revenue Act and therefore came within the provisions of the Refunding Act of June 27, 1902, (32 Stat. L. 406).

But counsel does contend that the vested right to the income to be derived from $14,872.26 is subject to a legacy tax.

It is to be observed that the Collector of Internal Revenue never made an attempt to assess or impose any legacy tax on such vested right to the income, for the simple reason that such income, computed according to the official mortuary tables adopted by the Commissioner of Internal Revenue, *would not amount to the sum of $10,000.*

In order to be subject to a legacy tax, the legacy or the income therefrom must amount to the sum of $10,000.00.

Act of June 13, 1898, 30 Stat. 448, as amended by Act March 2, 1901, 31 Stat. 946.

The evidence shows conclusively that the income never amounted to the sum of $10,000.00. Finding of Fact XVIII sets forth: "That the income derived from the share of the estate bequeathed and distributed by said last will and testament to Harriet L. Herrmann, of the value above set out, to be held in trust as aforesaid did not at any time previous to the repeal of the law on July 1, 1902, amount to the

sum of $10,000.00 a year or at all." (Transcript of Record, p. 23.)

It is to be observed that according to the provisions of the trust, Jeremiah F. Sullivan was: "(3) To pay over to my said daughter annually, the rents, issues, profits and income thereof, after deducting the expenses of managing, controlling and operating the same."

Assuming that phase of the case most favorable to the contention of plaintiff in error, to-wit: that the legatee, Harriet L. Herrmann, had a vested interest in what was equivalent to a *life estate* to the income to be derived from a legacy of $14,872.26, and computing such income according to the mortuary tables adopted by the Commissioner of Internal Revenue, in compliance with the terms of the decision of the Supreme Court of the United States in the case of United States vs. Fidelity Trust Co. 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed.——, which decision was followed by this court in its opinion rendered April 1, 1912, and we find that even according to this generous method of compution the income would not amount to $10,000.00 or to a sum greater than $9,487.04, which latter sum, of course, is not subject to a tax.

The mortuary tables adopted and promulgated by the Commissioner of Internal Revenue will be found printed on the back of the "Legacy Return," being Government blanks prepared for the purpose of ascer-

taining, assessing and collecting taxes on legacies or the income to be derived therefrom. The "Schedules" and "Legacy Return" prepared and filed with the Collector of Internal Revenue in the estate of George D. Bliss were introduced in evidence and marked "Plaintiff's Exhibit 1." (See page 133 of Transcript of Record in case No. 2031.)

We also refer to the same mortuary tables officially announced in the "Compilation of Decisions rendered by the Commissioner of Internal Revenue" at pages 195 to 199 thereof. This is an official publication and this court will undoubtedly take judicial notice thereof. It contains the identical mortuary tables found printed on the back of the "Legacy Return" and marked "Plaintiff's Exhibit 1."

An important factor in arriving at the present worth (that is, by present worth is meant previous to the repeal of the law on July 1, 1902) of a life interest in a legacy is the age of the legatee.

The age of Mrs. Harriet L. Herrmann, at the time of the death of her father in February, 1902, was *36* years. (See ages set out in the "Legacy Return"—Plaintiff's Exhibit 1)

Computation.

Given a life interest in $14,872.26 to a person *36 years of age.*

To Find

The present worth according to the United States Mortuary tables.

Present worth of an annuity of $1.00 at 36 years	$15.94755
Annuity on legacy of $14,872.26 at 4% interest	$594.89
Present worth of the annuity of $594.89 at 36 years	$9,487.04

As the sum of $9,487.04 does not amount to the sum of $10,000.00, it is, of course, not subject to a legacy tax.

This court, on consulting the mortuary tables printed on the back of the "Legacy Return" (Plaintiff's Exhibit 1), can easily verify the above calculation of the present worth of an annuity or life interest in the sum of $14,872.26 left to a person 36 years of age.

The calculation can be paraphrased almost in the language of "Example 2" contained on the back of the "Legacy Return" (Plaintiff's Exhibit 1.) as follows: A person dying bequeaths to his daughter, age 36 years, a life interest in personal property amounting to $14,872.26.

At a net interest of four per cent per annum, the assumed rate, the estate of $14,872.26 would realize an income or annuity of $594.89. The present value of the sum of $1.00, payable at the end of each year during the life of a person aged 36 years, is found by the table (see table printed on back of "Legacy Return"—Plaintiff's Exhibit 1.) to be $15.-94755, and the present value of an annuity of $594.89 for the same time would be Five hundred and ninety-four and eighty-nine one hundredths times as much, or $9,487.04, the amount upon which the tax accrued.

This arithmetical showing furnishes a complete answer to any and all contentions made by the plaintiff in error.

Under any theory that counsel can advance, the income does not amount to the sum of $10,000.00, and therefore cannot be subject to a legacy tax. We have given him the benefit of all doubts and have assumed, gratuitously, as we believe, that the income to be derived from a legacy of $14,872.26 held in trust for a person 36 years of age was akin or might be likened to the income to be derived from a similar sum held in trust *for the life* of a person 36 years of age. And yet, even under this generous concession on our part, we find that the amount of income, computed according to the official mortuary tables, does not amount to

the sum of $10,000.00 or to a sum greater than $9,-487.04.

This effectually disposes of Plaintiff in Error's contentions.

However, before closing, we cannot refrain from alluding to certain statements made by counsel for the Government as to the applicability of certain sections of the Revised Statutes, notably sections 3226, 3227 and 3228.

He concedes that the present action is brought under section 3 of the Act of June 27, 1902, 32 Stats. L. 406 (see page 5 of Petition for Re-hearing on behalf of Plaintiff in Error.)

The Attorney General of the United States has had occasion to construe this section and has distinctly held that the provisions of this section are special and apply to a particular class of obligations against the Government, and, being special, that claims to refund legacy taxes are not governed nor subject to the provisions of section 3226, 3227, 3228, or any other section, of the Revised Statutes.

The learned Attorney General further held that suits for the recovery of money due under the "Refunding Act" of June 27, 1902, *are not actions for the recovery of taxes,* but for money held by the Government *in trust for the benefit of the parties to whom it rightfully belongs.*

See Opinions of Attorney General, Vol. 26, p. 194, *197*, *198*.

After referring to the facts submitted by the Commissioner of Internal Revenue to the Attorney General for his opinion (which facts are similar to those involved in the case at bar) and setting out section 3 of the Act of Congress of June 27, 1902, (under which section the suit in the case at bar was brought and recovery had in the court below), the learned Attorney General said:

"It can not be held that claims arising under this act are barred, because of the failure of the claimants to present them for allowance within two years from the date of payment. The provisions of the act are special, and apply to a particular class of obligations against the Government. *Being special, these claims are not governed by the provisions of the prior general statute.* (R. S., sec. 3228.) Suits brought to recover money due under this act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. *The act, by its terms, creates and acknowledges the obligation of the Government.* A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. *It is, therefore, an obligation payable on demand, and the statute of*

limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. (United States v. Wardwell, 172 U. S., 48.)

"It will be observed that *under the provisions of this statute Congress has granted a right of repayment, regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgement by Congress of a supposed moral obligation; a provision as a bounty of the Government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial.* In the case of Thacher et al. v. The United States (149 Fed. Rep., 902) the tax was paid voluntarily and without protest. In passing upon the effect of the statutes above quoted the court said (p. 903):

"'The petitioners could not at any time have maintained suit to recover the tax as having been illegally collected. They had paid it voluntarily, not under protest. Their claim to a refund, if they had any, was moral only, and not legal. It appealed only to the Government's sense of fairness, and could be satisfied only by the bounty of the United States, given upon such terms as Congress saw fit to impose. * * * The act of 1902 fixes no time within which the claim for a refund must be filed with the collector, and no departmental regulation has been called to the attention of the court. Even if the limit fixed by Revised Statutes, section 3228, be applicable here by analogy, yet the two years therein mentioned must run, if they run at all, not from the payment of the tax, which was ineffective to create the claim here in suit, but from the passage of the act providing the bounty which the petitioners seek to obtain. That the tax paid by the petitioners in 1901

was illegally collected is irrelevant to the issues raised by this petition.'"

Opinions of the Attorney General, Vol. 26, p. 194, *197, 198.*

Thacher et al. v. The United States, 149 Fed. Rep. 902.

The reasoning of the Attorney General seems to us unanswerable and effectually disposes of the contentions made by the United States Attorney.

And speaking of the liberal policy of this Government, in refunding to its citizens taxes unlawfully and erroneously collected, the language used by the court in the case of Armour v. Roberts, 151 Fed. R. 846, *850*, involving the refunding of legacy taxes, is peculiarily appropriate.

Says the learned Judge in that case: "The United States Attorney and his assistant, in argument at the bar, conceded that the Government now has the large sum of money morally, and perhaps legally, belonging to plaintiffs, and, while not saying in language, the answer to the plaintiffs was, in effect and meaning, there is no way to reimburse the plaintiff. *The honor and integrity and fair dealing of our Government ought to be, and is, on the same high plane that exists between citizens of high character, and the powerful should not take from the weak without compensation, and the spirit of fair dealing of our Government can only be preserved by and through its agencies, one of which is the court.*

So that it follows, as will be conceded by every person, that the Government should make restitution of this money, and if the power to do so is not with some officer, it should be adjudged by this court, if it has the jurisdiction to do so.

"Whether the act of the Collector was a tort, or an implied contract to refund by his superior, must be determined from a very few facts. The Government, as per statutes, has the right to tax. The statute in question was open to two supposed constructions. The Commissioner of Internal Revenue adopted that construction in favor of the Government. In doing so, he acted in good faith, and with the best of motives. He believed he was within the law, and, so believing, exacted the return and the payment. But it turned out that he was mistaken in his interpretation of the statutes, as was held by the Supreme Court in the case of Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, denying the contention of the government and its law officers, and reversing the Circuit Court. So that whether, in the case at bar, the collector did a wrong amounting to a tort when he made the collection, must be decided. If it were a wrong, it can only be avoided by doing another wrong, viz., refused to abide by a recent decision of its highest court, concurred in by all the Justices. To establish one wrong, another wrong must be done."

We have also respectfully to remind this Court that in a similar case, Muenter v. Friederich, No. 2035, this Court, on November 1, 1912, denied the petition for Rehearing filed by the representative of the Government, in which he advanced precisely the same

argument, as to the applicability of sections 3226, 3227 and 3228 of the Revised Statutes, which he now urges upon this Court as his second contention.

Furthermore, there can be no "question of excessive valuation" in the case at bar, as contended by counsel for the Government on page 8 of his Petition for Re-hearing. The position of the defendant in error is that there can be no *tax whatever,* under any phase of the case that might be imagined. This is not a case of excessive valuation. This is a case where *no tax whatever* could lawfully be imposed by the Collector of Internal Revenue, for the reasons; first, that the *legacy* itself—the corpus of the legacy—is a contingent, beneficial interest, which this court has held, in its opinion rendered April 1, 1912, did not vest in the legatee, Harriet L. Herrmann, prior to the repeal of the War Revenue Act on July 1, 1902, and, second, that the *vested right* to the *income,* computed according to the official mortuary tables, (assuming, by analogy, that said vested right to the income is one for the *life* of Harriet L. Herrmann), does not amount to the taxable sum of $10,000.00, inasmuch as she was 36 years of age at the time of the death of her father, George D. Bliss, and a vested right to the income from a legacy of $14,872.26 left in trust *for life* to a person 36 years of age, computed according to the official mortuary

tables, would amount to $9,487.04, which sum, confessedly, is not large enough to be subject to any legacy tax.

In addition to the foregoing argument, we beg to refer to the several points and authorities contained in our brief in this and companion cases filed at the time of the original hearing in this case insofar as the same are applicable on this rehearing.

Without pursuing the subject further we contend that the decision of this court rendered April 1, 1912, (195 Fed. Rep. 480), affirming the judgment of the lower court in this case, should not be disturbed or changed.

MARSHALL B. WOODWORTH,
Attorney for Defendant in Error.

EDWARD LANDE,
Of Counsel.

NOTE

In verification of the correctness of our figures as to the clear value of a vested right to an income for life from a legacy of $14,872.26 left in trust for the benefit of a person 36 years of age, we append to this brief, in the shape of an exhibit "A," the computation of McLaren, Coode & Co., certified public accountants at San Francisco, and have attached the original of this exhibit to the original brief filed in this case and served upon the United States Attorney.

EXHIBIT "A"

McLAREN, GOODE & CO.
CERTIFIED PUBLIC ACCOUNTANTS
ALSO AT PORTLAND OREGON
AND LOS ANGELES
AGENTS FOR
DELOITTE, PLENDER, GRIFFITHS & CO.
OF
NEW YORK, LONDON, MEXICO CITY AND JOHANNESBURG

CABLE ADDRESS "CERTIFIED
CODES { BENTLEY'S / WESTERN UNION

519 CALIFORNIA STREET
(CORNER OF MONTGOMERY STREET)

San Francisco, Cal., May 8, 1913.

M. B. Woodworth, Esq.,
519 California Street,
San Francisco, California.

Dear Sir:

Referring to your inquiry of yesterday in regard to the present worth of the income of the life interest in a certain legacy, we report as follows:

Given

A life interest in $14,872.26 to a person 36 years of age,

To Find

The present worth according to United States tables.

Present worth of an annuity of $1.00 at 36 years	$15.94755
Annuity on legacy of $14,872.26 at 4% interest	$594.89
Present worth of the annuity of $594.89 at 36 years	$9,487.04

We are, Dear Sir,
Yours very truly,
McLAREN, GOODE & Co.